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## Drones

By Gregory M. Palmer and  
Katherine Abigail Roberts

**C**ongress recognized that aviation is a niche area in the federal preemption scheme, and state and local drone laws and ordinances will probably generate much preemption-related litigation.

# Preemptive Effect of Federal Aviation Regulations on State and Local Laws

Imagine a future where drones deliver packages to your doorsteps. Imagine a future where your neighbors can conduct aerial surveillance into your bedroom window.

Imagine a future where your teenage neighbor occupies

the same airspace as a commercial aircraft carrying hundreds of passengers. Although these imaginings seem straight out of science fiction, the reality is that future is now. With the proliferation of both private and commercial drone usage, our airspace is becoming increasingly crowded. While the development of drone technology is exciting and revolutionary, drone utilization has far outpaced regulatory oversight and has, unfortunately, opened the distinct possibility that drones will contribute to future catastrophic accidents.

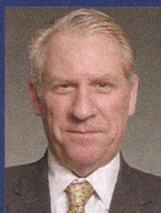
In an effort to address the rapid increase in drone usage for commercial, private, recreational, and law enforcement purposes, numerous jurisdictions—on both the state and the local level—have enacted laws and ordinances addressing drone operation. Operating concurrently with these various laws, however, is the new Federal Aviation Administration (FAA) regulatory framework regarding the operation and registration of drones, also referred to as

“unmanned aircraft systems” (UAS). This has created a hodgepodge of regulations and laws that not only has left private citizens confused about how to comply, but also has created significant federal preemption implications. This article explores the federal preemption issues that are expected to arise in this emerging field.

### Federal Preemption 101

We anticipate that one of the major issues in future drone litigation is the extent to which the FAA’s regulations will preempt various state laws and local ordinances that have been, or will be, enacted. Practitioners in the aviation field will be well-advised to become familiar with the nuances of federal preemption because the FAA has noted that the development of law in this area will come from litigation at the local level.

As most federal practitioners are aware, preemption is the concept by which certain matters are determined to be of such a national interest that federal laws will



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negate, or take precedence, over the local law. The authority of Congress to preempt state laws is contained in Article VI of the Constitution, which provides that the laws of the United States “shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Therefore, any state law that “conflicts

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with federal law is ‘without effect.’” *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (citations omitted).

The United States Supreme Court has explained that the primary consideration when conducting a preemption analysis is congressional intent, and the “historic police powers of the States” will not be disturbed by federal legislation or regulations unless it is the “[c]lear and manifest purpose of Congress.” *Id.* (citations omitted). The means by which preemption will be found are either (1) express preemption, (2) conflict preemption, or (3) field preemption. Express preemption is exactly what its name implies: when Congress expressly states its intention to preempt state law “explicitly... in the statute’s language or implicitly contained in its structure or purpose.” *Id.* (citations omitted). Conflict preemption occurs when a state law conflicts with a federal law, and field preemption occurs when “a federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’” *Id.*

As more fully analyzed in this article, the new federal drone regulations contain no express preemption provisions. So the preemption analysis in this context will involve case-specific scenarios as they relate to either conflict or field preemption. In fact, as more fully described below, the

FAA has expressed its intention that the states’ traditional police powers will operate concurrently with the new regulatory structure as much as they can.

### **Preemption in the Aviation Context**

Aviation practitioners are no strangers to preemption analysis; it is one of the cornerstones of aviation practice. Aviation is a specialized industry in which nearly all of the regulation comes from the federal level. The FAA has been vested by Congress with authority to regulate certain areas related to airspace. *See* 49 U.S.C. §40103(a)(1) (1994) (granting “[t]he United States Government... exclusive sovereignty of airspace of the United States.”). In fact, in creating the FAA, Congress recognized that aviation is a niche area in the federal preemption scheme:

[A]viation is unique among transportation industries in its relation to the federal government—it is the only one whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.

*Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 368 (3d Cir. 1999) (quoting S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958)).

One of the primary purposes of the FAA is to ensure air safety, and the FAA was actually created in response to a series of “fatal air crashes between civil and military aircraft operating under separate flight rules.” *Id.* at 368. Therefore, it has been noted that Congress’s intent was that the FAA would “[p]romote safety in aviation and thereby protect the lives of persons who travel on board aircraft.” *Id.* (citations omitted). Under this framework, the FAA has “[i]mplemented a comprehensive system of rules and regulations, which promotes flight safety by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.” *Id.* at 369.

The FAA has explained that it has the authority to “regulate the areas of airspace use, management and efficiency, air traffic control, safety, navigational facilities, and aircraft noise at its source.” *See* State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, Fed. Aviation Admin. Office of the Chief Counsel (2015)

(UAS Fact Sheet), <https://www.faa.gov> (citing 49 U.S.C. §§40103, 44502, and 44701-735). To that end, the FAA has directional authority from Congress to “prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes)’ for navigating, protecting and identifying aircraft; protecting individuals and property on the ground; using the navigable airspace efficiently; and preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.” *Id.* (citing 49 U.S.C. §40103(b)(2)).

### **Federal Drone Regulations**

It is with this background in mind that we now turn to the FAA regulations regarding unmanned aircraft systems (UAS). In 2012, Congress directed the Secretary of Transportation in Section 333 of the FAA Modernization and Reform Act of 2012 to determine if UAS could safely operate in the national airspace system, and, if so, to establish the requirements for the safe operation of these systems. *See* FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11.

Following the issuance of a notice of proposed rulemaking, the final Small UAS Rule (Small UAS Rule), which was codified as 14 C.F.R. Part 107, went into effect on August 29, 2016. The Small UAS Rule contains a comprehensive set of regulations regarding the operation of commercial drones. These regulations will operate separately but concurrently with the rules for hobby or recreational drone use, which are contained in the Special Rule for Model Aircraft. *Id.* §336.

The regulations in 14 C.F.R. Part 107 are pervasive and establish a very comprehensive set of guidelines for the integration and operation of unmanned aircraft into the national airspace. Consistent with the primary purpose of the Federal Aviation Administration—ensuring air safety—the regulations deal with operational limitations for drone usage and establish minimum requirements for drone operators.

Among the primary regulations contained in Part 107 is the requirement that all unmanned aircraft, which must weigh less than 55 pounds, be operated solely in the visual line of sight (VLOS) of the operator at nearly all times, subject to certain



restrictions. See 14 C.F.R. §107.31. Further, Part 107 requires that small unmanned aircraft may not be operated directly over any persons not participating in the operation, 14 C.F.R. §107.39; they must be operated in the daylight, 14 C.F.R. §107.29; and the regulations also establishes maximum speed and altitude restrictions. 14 C.F.R. §107.51. Additionally, Part 107 establishes a remote-pilot-in-command position and requires that a person operating a small UAS hold a remote-pilot airman certificate or be under the supervision of someone who holds such a certificate. 14 C.F.R. §107.19.

Importantly, the Small UAS Rule contains no express preemption provision. However, obviously anticipating the significant preemption issues that the proposed regulatory framework could cause, the Office of the Chief Counsel of the Federal Aviation Administration released an advisory fact sheet on December 17, 2015, titled, "State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet" (UAS Fact Sheet), which was intended to "[p]rovide basic information about the federal regulatory framework for use by states and localities when considering laws affecting UAS." *Id.* This document provided practical and legal guidance to assist local authorities with navigating the potential preemption issues that may arise and admonished that "[s]tate and local restrictions affecting UAS operations should be consistent with the extensive federal statutory and regulatory framework pertaining to control of the airspace, flight management and efficiency, air traffic control, aviation safety, navigational facilities and the regulation of aircraft noise at its source." *Id.*

Aviation practitioners and local and state lawmakers, should follow the UAS Fact Sheet's guidance closely. The FAA's decision to exclude express preemption language in its final rule was done with the thought that preemption issues would more appropriately be decided on a case-specific basis on a local level. The FAA expressly noted the following:

The FAA is not persuaded that including a preemption provision in the final rule is warranted at this time. Preemption issues involving small UAS necessitate a case-specific analysis that is not appropriate in a rule of general applicability. Additionally, certain legal aspects concerning

small UAS use may be best addressed at the State or local level. For example, State law and other legal protections for individual privacy may provide recourse for a person whose privacy may be affected through another person's use of a UAS."

Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed. Reg. 42,063 42,194 (28 June 2016).

However, the FAA has observed the obvious notion that significant "air safety issues are raised when state or local governments attempt to regulate the operation or flight of aircraft" and that "a navigable airspace free from inconsistent state and local restrictions is essential to the maintenance of a safe and sound air transportation system." See UAS Fact Sheet, *supra*, at note 11 (citing *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007); *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); *Arizona v. U.S.*, 567 U.S. \_\_\_, 132 S. Ct. 2492, 2502 (2012) ("Where Congress occupies an entire field... even complimentary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulations in the area, even if it parallel to federal standards."); and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386-87 (1992)).

Given the nature and the character of the regulations contained in the Small UAS Rule, many of the state and local preemption issues should be avoidable by reading the plain language of Part 107 and by complying with the guidance contained in the FAA UAS Fact Sheet. The UAS Fact Sheet cites several examples of state and local laws for which consultation with the FAA is recommended. In particular, the UAS Fact Sheet notes that preemption issues may arise with local ordinances or state laws involving "operational UAS restrictions on flight altitude," "flight paths," or "any regulation of navigable airspace." See UAS Fact Sheet, *supra*, at note 11. Further, it noted that a "city ordinance banning anyone from operating UAS within the city limits, within the airspace of the city, or within certain distances of landmarks" would be strictly scrutinized. *Id.* (citations omitted). Additionally, the UAS Fact Sheet notes that preemption will likely be found when a local government imposes restrictions regarding aviation safety, equipment, or training for UAS. *Id.* (citing *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 740 (E.D. N.C. 2008); *Air*

*Evac EMS, Inc. v. Robinson*, 486 F.Supp.2d 713, 722 (M.D. Tenn. 2007)).

In contrast, the UAS Fact Sheet does recognize that preemption was not likely to be found in those areas that are traditionally related to state police power, including "land use, zoning, privacy, trespass, and law enforcement operations." *Id.* (citations omitted). To that end, the FAA specifically

One of the primary purposes of the FAA is to ensure air safety, and the FAA was actually created in response to a series of "fatal air crashes between civil and military aircraft operating under separate flight rules."

included several examples of local government police powers that can permissibly exist concurrently with the federal regulations, such as laws or ordinances that (1) require police to obtain a warrant before using UAS for surveillance; (2) specify that UAS may not be used for voyeurism; (3) prohibit the use of UAS for hunting or fishing, or to interfere with or harass an individual who is hunting or fishing; or (4) prohibit attaching firearms or similar weapons to UAS. *Id.*

For many of the state laws that have been enacted at the time of this publication, preemption will not likely be a major concern because the laws largely fall within the "police power" exception that has been carved out for the states. For example, Florida's Freedom from Unwarranted Surveillance Act prohibits its law enforcement from using drones to gather evidence, subject to certain exceptions. See Fla. Stat. §934.50(3)(a). It also prohibits surveillance by any person, state agency, or political subdivision

**Preemption**, continued on page 100



## **Preemption**, from page 57

from conducting surveillance of private property in violation of the owner's reasonable expectation of privacy. *See* Fla. Stat. §934.50(3)(b). Similarly, Arkansas recently amended its voyeurism statute in 2015 to include voyeurism by unmanned vehicle or aircraft. Ark. Code Ann. §5-16-101 (2016). This type of legislation is representative of much of the enacted state legislation, which mainly encompass the law enforcement purposes to serve and to protect citizens from voyeurism. As a result, based on the guidance provided by the FAA in the UAS Fact Sheet, we do not expect that laws of this nature will meet major preemption challenges.

On the other hand, however, there are certain state laws, as well as numerous local ordinances, that are being enacted throughout the country that are much more restrictive and will almost certainly face preemption challenges. Whether any particular ordinance will be preempted will largely depend on the language in it, and it will be for the courts to decide how to interpret these ordinances. Major cities such as Chicago and Miami have enacted ordinances that although complementary to the FAA regulations in many respects, also may conflict with the pervasive FAA regulations. Chicago's drone law, contained in Chapter 10-36-400 of the Municipal Code of Chicago, prohibits the operation of drones directly over hospitals, schools, and places of worship. Similarly, Miami's Drone Law, contained in Miami's Code of Ordinances Sec. 37-12, Public Safety and Unmanned Aircraft Systems, Commonly Known as Drones, prohibits, among other things, UAS from being flown in any airspace within or over any sporting or large venue special event.

Ordinances such as these that impose additional restrictions on flight plans and drone operation beyond traditional police powers run the risk of federal preemption scrutiny despite the care taken by the legislative authority to largely complement the federal regulations. The FAA has specifically noted that a "city ordinance banning anyone from operating UAS within the city limits, within the airspace of the city, or within certain distances of landmarks" would be strictly scrutinized. *See* UAS Fact Sheet, *supra*, at note 11. To the

extent that the FAA permits a drone operator to perform certain actions and local authorities prohibit, or even criminalize, the same conduct, we expect to see legal challenges from the federal government or local drone operators.

Many of these legal challenges will likely arise in situations similar to that which occurred in Los Angeles, California, relatively recently. In October 2015, Los Angeles passed Municipal Code Section 56.31, which included operational restrictions on drone usage. The first person to be charged under Los Angeles' ordinance, filmmaker Arvel Chappell, filed a constitutional preemption challenge to the law. Although the court did not issue an order regarding preemption, the city responded by dismissing the majority of charges against Mr. Chappell after the motion was filed. Many legal challenges of this nature are anticipated in the upcoming months and years as municipalities move to protect their citizens from the perceived dangers of unrestricted drone usage, upon finding the FAA requirements to be too lenient. We anticipate that the vast majority of the litigation will come from the local ordinances that criminalize certain drone operations that are prohibited by the FAA, but also those that impose certain regulations on drone operations that are not included in the federal regulations. Local governments will argue that these ordinances complement their local police powers, but significant push back from the FAA is expected. We can certainly expect challenges from the federal government to ordinances of this nature due to their potential inconsistency with federal law, as well as from private individuals who have been charged under the various drone laws.

## **Conclusion**

We are hopeful that the information contained in this article will assist aviation practitioners in navigating the complicated preemption issues that will arise in the unmanned aircraft system landscape in the years and decades to come. Given the uncharted territory that we are about to enter from a litigation perspective, lawyers will be well-advised to consider the complex interplay between federal and local laws when counseling their clients on UAS regulatory compliance.

## **Collisions**, from page 79

ness groups, privacy advocates, and others within 90 days to develop privacy rules for commercial and private drones. The American Civil Liberties Union, while praising the memorandum as an important step, has stated that it still falls short of fully protecting the privacy of Americans in that the proposal allows the use of data gathered by domestic drones for any "authorized purpose," but that term is not defined, leaving the door open to inappropriate drone use by federal agencies.

## **Summary**

As is the case with many new technologies, it takes time for rules and regulations, which are designed to protect society from itself, to develop. The rules and regulations to integrate unmanned aircraft into airspace previously occupied only by manned aircraft are still a work in progress. As the chronological history previously noted indicates, the evolution of the requirements to integrate unmanned aircraft is taking shape and providing an unmanned aircraft user with an understanding of what is (and what is not) allowable. Anyone hiring an expert to reconstruct a vehicle collision, just as anyone hiring an expert in any area of medicine, science, or engineering, must be cognizant of whether the expert that he or she retains is aware of and capable of utilizing the latest technology in the expert's field and has a full understanding of when that technology can legally be used. It is reasonable that an opposing party might question the legality of any data collected without the proper permits and permissions.

The understanding of this new technology not only allows for a potentially more accurate and thorough documentation and analysis of a specific event, but it can lend itself to more comprehensive and compelling trial exhibits to help demonstrate the results of the analysis. Drones, when they are brought into play properly, are simply another in a long line of continually evolving technological advances that will be available for use by forensic experts in varying disciplines. However, to take full advantage of this technology it must be done appropriately by a qualified expert within the regulatory parameters.